The Original Jurisdiction of the Ohio Supreme Court

ROBERT L. HAUSSER†

When Maitland[1] surmised: "The forms of action we have buried but they still rule us from their graves," he did not reckon that in Ohio today a few antiquated forms of action are alive and kicking.

In particular are five writs of *quo warranto*, *mandamus*, *procedendo*, *prohibition*, and *habeas corpus*, which the Constitution of Ohio lodges in the original jurisdiction of the Supreme Court.[2]

Legislatures have taken great strides in abolishing common law forms and in devising simpler methods of procedure.[3] The old forms of action are not inherently vicious. Indeed, when they are abolished, the legislatures often substitute a statutory proceeding with similar characteristics and identical substantive rights preserved. Nevertheless, there is advantage in the change. The common law forms, hoary with age, have become so steeped in judicial dogma that jurists, in administering the law, spend more time in maneuvering through procedural by-paths than in applying the substantive law to reach a just result. However, when the common law forms are ostensibly abolished, courts are induced to fly above the procedural fog and into the high strata where the vision is clearer.

The original writs of quo warranto, mandamus, procedendo,

† Member of the Ohio and New York Bars.

[1] MAITLAND, EQUITY (Chaytor and Whittaker ed., 1910), p. vi.

[2] OHIO CONSTITUTION, Art. IV, sec. 2.

[3] Legislatures, not the courts, have been instrumental in the reform. Thus, the sweeping procedural reforms in New York and Illinois were the product of the legislatures. Although today the courts are encouraged by the legislatures to govern procedural matters—*cf.* the new Federal Rules of Procedure and the power in the New York Courts to amend rules of practice—the fossilizing of the above named writs into the Ohio Constitution prevent both the General Assembly and the courts from taking positive steps in reform.

prohibition, and habeas corpus, long legally matured, have not escaped confusing distinctions that terrify the practicing lawyer, who may invoke the original jurisdiction of the Ohio Supreme Court but once or twice in his entire practice. Should he use mandamus or procedendo? Should he commence action in the Court of Appeals or the Supreme Court? Does Holdsworth in a footnote preserve a comment that will be raised to defeat recovery? Why should he commence his quo warranto action in an inferior court if he can begin immediately in the Supreme Court? Will he too face the usual judgment: "Mr. Lawyer, your client deserves some legal relief; but too bad, you have chosen the wrong writ." Are these writs so steeped in technical accretions that new simplified procedures are imperative?

Development of the Original Jurisdiction

Ordinance of 1787. The Congress of the Confederation, in framing the Northwest Ordinance of 1787, did not specifically mention the prerogative writs of quo warranto, mandamus, procedendo, and prohibition.[4] Instead, Congress vaguely provided for the application of common law principles—which may or may not have included all these writs:

> Section 14, Article II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, . . . and of judicial proceedings according to the course of the common law.[5]

Convention of 1802. The first convention of 1802 in its final product continued the vague grant of power to the Supreme Court:

> Article III, Section 1. The judicial power of this state, both as to matter of law and equity, shall be vested in a supreme court . . . .
>
> Section 2. . . . [The supreme court] shall have original and

[4] *Cf.* General Code of Ohio (Page's ed., 1910), Vol. IV, p. 51.

[5] In 1798 the legislature of the Northwest Territory enacted "that the comman [*sic*] law of England, and all statutes in aid thereof, made previous to the fourth of James I, should be in full force within the Territory." Rep. Sec'y State (1876) 24. This, of course, gives no specific answer as to the extent to which the prerogative writs were to be in force in Ohio.

appellate jurisdiction, both in common law and in chancery, in such cases as shall be directed by law . . . .[6]

Acting under this grant, the legislature from time to time defined the jurisdiction of the Supreme Court, including a limited original jurisdiction.[7]

Convention of 1850-51. When the Judiciary Committee of the Constitutional Convention of 1850 reported its deliberations, it recommended that the Supreme Court be empowered with definite original jurisdiction in cases of "quo warranto, mandamus, habeas corpus, and procedenda [*sic*]."[8] The Committee gave no reason for its enumerating the original jurisdiction of the Supreme Court; and no delegate ever questioned the wisdom of not permitting the legislature to continue to define the original jurisdiction. The only suggestion offered by the delegates was to insert English titles in place of the Latin, in order to enlighten the lay-delegates what powers were given to the Court.[9] In support of the lay view, Mr. McCormick proposed "a writ of 'why do you do it' " in place of *quo warranto;* " 'Do it, damn you' " in place of *mandamus;* " 'have his carcass' " in lieu of *habeas corpus;* and " 'Davy Crockett' " to supplant *procedendo.*[10] Nevertheless, the new Constitution, as approved, embodied the four writs in the Latin.[11]

Convention of 1874. The delegates to the unsuccessful Constitutional Convention of 1874 likewise raised no complaint as to the existing original jurisdiction of the Supreme Court, although they discussed fully other ways and means to reduce the overcrowded calendar of that Court.[12]

---

[6] GENERAL CODE OF OHIO (Page's ed., 1910), Vol. IV, p. 61.

[7] 1 Ohio St. (1852), Preface xi.

[8] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* (1851), Vol. I, p. 585. Hereafter cited *Debates, Convention of 1850-51.*

[9] 1 *Debates, Convention of 1850-51,* p. 588.

[10] *Id.* at 590.

[11] 1 Ohio St. (1852), Preface xi.

[12] *Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio, 1873* (1874), Vol. II, Pt. I, p. 416. Mr. Minor:

Convention of 1912. Again, the Constitutional Convention of 1912 swallowed the original powers of the Supreme Court whole, without inquiring whether the writs were necessary or desirable. Without discussion the Convention permitted Delegate Worthington to add the writ of prohibition, although Judge Worthington himself admitted that lawyers today "have very hazy notions . . . as to what a writ of prohibition is" and that the court had been able to use mandamus to do the work of prohibition, by ordering a court affirmatively not to do an act.[13]

It is obvious from the work of the four Conventions that the five original powers were given to the Supreme Court with virtually no discussion as to the need for them. The Conventions were too concerned with curing other evils in the judiciary. And it is probable that the delegates had such "very hazy notions" as to the scope of the writs that they thought it best not to tamper with the original jurisdiction of the Supreme Court. At the present time lawyers are no better enlightened as to this jurisdiction.

Today, nevertheless, we believe that the Constitution should be concise and clear. The details of enforcing the broad mandates should be the concern of the legislature and the courts. Latin terms must not survive successive Constitutions merely because lawyers have too "hazy notions" of the meaning of the Latin terms safely to eliminate them. At present we do not believe that appellate courts should be forced to sit as fact-finding tribunals unless extraordinary circumstances

". . . what should be the jurisdiction . . . of the supreme court . . .? As to its original jurisdiction, there is no disagreement that I am aware of. The differences of opinion in the Convention are as to its appellate jurisdiction . . . ."

See Patterson, The Constitution of Ohio (1912) for subsequent proposals to amend the Judiciary Article of the Constitution of 1851. None of these sought to disturb the original jurisdiction of the Supreme Court.

[13] *Proceedings and Debates of the Constitutional Convention of the State of Ohio* (1912), Vol. I, p. 1044. Hereafter cited *Proceedings and Debates, Convention of 1912.*

exist. In these respects does the Ohio Constitution require renovation?

Quo Warranto

In reality, the Ohio Supreme Court has but one writ devoted exclusively to original jurisdiction—that of quo warranto. With the exception of a function of mandamus and of habeas corpus, the other writs of mandamus, procedendo, prohibition, and habeas corpus do not initiate law suits; they are used in conjunction with litigation already begun. These latter four writs the Supreme Court is empowered to use to regulate an inferior tribunal before which an action has been commenced.

Early Common Law. The ancient writ of quo warranto was a prerogative order, issued out of Chancery to enable the king to enquire whether the possessor of a crown office or franchise held it rightfully.[14] Although used effectively by Edward I in his struggle against the rival court systems of the lords, the writ not only involved cumbersome procedure, but the decree was conclusive for the future against the crown as well as the subject.[15] The judgment did not involve more than a seizure of the franchise.[16]

In England today. Hence the old writ fell into disuse. In its place arose the *information in the nature of a quo warranto* filed by the Attorney-General. The process upon this is different; and the decree does not bind the government conclusively for the future. Not only may the court fine the usurper, but it can oust him from office as well.[17] It is probable that the original Ohio common law incorporated this latter proceeding of *information.*[18]

In Ohio today. When the Constitutional Convention of 1851 gave the Supreme Court original jurisdiction to hear quo

[14] Pollock and Maitland, History of English Law (2d ed. 1905), pp. 336-337.

[15] 1 Holdsworth, History of English Law (3d ed., rewritten, 1922), pp. 229-230.

[16] 33 Ohio Jurisprudence, pp. 953-954.

[17] 22 R.C.L. 656.

[18] 33 Ohio Jurisprudence, p. 953.

warranto cases, no delegate offered to explain what new power the writ would give to the Supreme Court that it was not already exercising by common law and statute. Nor did any delegate declare whether the General Assembly could thereafter alter the substance of the writ or the cumbersome common law procedure.

Despite the doubts as to the constitutional power of the legislature to alter the content of the writ that was set into the organic law, the legislature has sought to change both the substance and the procedure.[19] The Ohio Code contains a comprehensive list of the substantive rights to be protected by quo warranto.[20] More interesting are the statutory changes in procedure under the writ. The legislature declared quo warranto to be a civil action[21] and enacted a detailed procedure. But when the Assembly later established a uniform procedure for all ordinary civil actions, it neglected to repeal the statutes on the conduct of quo warranto actions. Hence, the preservation of the outmoded statutory procedure for quo warranto makes it all the more difficult today to use the writ.[22] None of the

[19] The General Assembly has retained the Statutes despite a dictum in *State* ex rel. *Attorney-General* v. *Taylor*, 25 Ohio St. 279 (1874), that the proceedings in quo warranto "is not governed by the code, and the pleadings are to be made up as at common law." But in another dictum in *State* ex rel. *Price v. Columbus, D. & M. Electric Co.*, 104 Ohio St. 120, 136 N.E. 59 (1922), the Supreme Court followed a procedural rule set up by General Code sec. 12315.

[20] For example, by General Code sec. 12303 a civil action may be brought in the name of the State: (1) *against a person* who unlawfully holds public office, civil or military, or a franchise within this State, or an office in a domestic corporation; (2) *against a public officer*, civil or military, who suffers an act which, by law, operates as a forfeiture of his office; or (3) *against an association* of persons who act as a corporation without being legally incorporated. (4) Section 12304 authorizes a civil action to be brought in the name of the State *against a corporation:* (a) when it has violated a provision of an act for its creation, or any amendment of such act; (b) when it has forfeited its privileges and franchises by non-user; (c) when it has committed or omitted an act which amounts to a surrender of its corporate rights and franchises; or (d) when it has exercised a franchise or right in contravention of law.

[21] OHIO GENERAL CODE, secs. 12303, 12304.

[22] For example, in contrast to an ordinary civil action, quo warranto is brought in the name of the State (General Code secs. 12303, 12304) upon

steps indicated in the footnotes are an improvement on the uniform procedure now in use in Ohio for ordinary civil actions.

Is it desirable that the Ohio Supreme Court continue its original jurisdiction in quo warranto? (1) The framers of the Ohio Constitution assigned no reason for giving this jurisdiction. (2) Nor is it indispensable to the integrity of the State: the New York Court of Appeals, for example, does not exercise such original power. (3) And the above statutory attempts to regulate the constitutional quo warranto powers of the appellate courts have made use of the writ confusing, not only because the statutory procedure is different from the uniform procedure in other civil actions, but also because the Supreme Court has not yet held whether the Assembly can define the rights and remedies of constitutional quo warranto.

(4) Of course, in 1851 (the Constitution of 1851 was first to give the Supreme Court this express power) it was not unthinkable to vest the Court with such jurisdiction. For, prior

---

relation of the Attorney-General or a prosecuting attorney (section 12307) or by one who is entitled to the office held by the usurper (section 12307), or in lieu of a prosecuting attorney by a member of the bar appointed by a judge (section 12309). By section 12305 the Governor, Supreme Court, or General Assembly may direct the Attorney-General or prosecuting attorney to commence action.

Action can be brought only in the Supreme Court, or in a Court of Appeals of the county where one of the defendants resides, or in the Court of Appeals of Franklin County, where the Attorney-General may file the petition.

Sections 12312 and 12313 prescribe alternate ways to commence suit. (1) The relator may apply for leave to file a petition, and the Court may notify the defendant and hear his argument to the motion, before the Court grants the leave. If the leave is granted, the Court shall endorse the fact on the petition, which shall be filed. Or (2) the petition can be filed without leave and notice, and a summons shall be served as in ordinary civil actions. Service by publication consists of a notice for four consecutive weeks in a newspaper in the defendant's county (section 12314). Thirty days are allowed between each further pleading (section 12315), which may consist of defendant's demurrer or answer, and plaintiff's demurrer or reply. Curiously, although the Constitution, Art. IV, sec. 4, permits the General Assembly to invest the Common Pleas with original jurisdiction in quo warranto, the legislature has not done so. Instead, it has authorized the Supreme Court or a Court of Appeals (section 12326) to remand its cases in which corporations are sought to be dissolved to the local Common Pleas for further proceedings.

to that time the justices had been travelling through the counties, as "stirrup judges," and sitting in original proceedings of "important" cases;[23] quo warranto actions were sometimes important cases.

But today most lawyers oppose the practice of initiating law suits before the Supreme Court, except in unusual circumstances. Rather, they believe that the highest appellate court should confine itself to questions of law that have arisen in the lower tribunals. The determination of issues of fact should be reserved for trial judges in the vicinage, where the local conditions coloring the facts can be discovered most easily. Ohio Supreme Court judges now save their stirruping for election months.

(5) Anyway, original proceedings before the Supreme Court in quo warranto have been unnecessary. Since 1803 the Supreme Court has heard no fewer than 163 such actions. Of these, 112 were commenced in the original jurisdiction of the Supreme Court; the others came by error or, since 1936, appeal. This plural bench of high-salaried members spent many days resolving issues of fact that could probably have been better determined by a single trial judge. The writer has found no case where it was necessary that the action be originated in the Supreme Court. The quo warranto actions that have originated in the Supreme Court have involved no greater political or social issues nor sums of money than have many of the ordinary civil actions commenced in the Common Pleas. Probably the proceedings to liquidate the Standard Oil Company of Ohio in 1892[24] was the outstanding of all quo warranto actions commenced in the Ohio Supreme Court; a more typical case, however, is a quo warranto proceeding to oust a member from a board of health.[25] But even a rare case like the Standard

[23] 1 Ohio St. (1852), Preface xi.

[24] State *ex rel.* Watson v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279, 15 L.R.A. 145, 34 Am. St. Rep. 541 (1892).

[25] State *ex rel.* Attorney-General v. Craig, 69 Ohio St. 236, 69 N.E. 228 (1903).

Oil Company proceeding does not today justify the determination of facts by the seven judges; a trial judge of the Common Pleas might just as competently make findings of fact—and dispose of issues of law as well. In the writer's opinion, had all the quo warranto cases been commenced in the Common Pleas, very few would have involved legal issues important enough to have reached the Supreme Court for review. The Ohio Supreme Court has not always boasted such a free calendar that it could assist the nisi prius judges.

(6) To allow dual jurisdiction in the Supreme Court and the Court of Appeals enables the relator a choice of at least two courts to commence suit. Naturally, he will use this advantage for self-serving ends: to find a set of judges who will be more sympathetic to his cause, or to lay venue in a court distant from defendant's witnesses.

(7) Probably the trickiest use of an original quo warranto action before the Supreme Court will be in testing the constitutionality of a statute. Follow closely.

By the Constitution, Art. IV, Sec. 2, the Supreme Court has but limited power to declare statutes invalid:

> No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.[26]

This constitutional limitation can affect a quo warranto proceeding in three situations when quo warranto is used to test the validity of a statute. (a) Suppose that such a quo warranto action is begun in a Court of Appeals. In its decision the Court of Appeals declares the statute *invalid*. The Supreme Court may either affirm or reverse the judgment by a bare majority of four members.[27] (b) Suppose that the Court of Appeals has ruled the statute *constitutional*. Upon the appeal

[26] Adopted Sept. 3, 1912.

[27] The decision of the lower court will be affirmed when the vote of the Supreme Court is split, three-to-three. *Cf.* Patten v. Aluminum Castings Co., 105 Ohio St. 1, 136 N.E. 426 (1922).

of the case, the Supreme Court may affirm this decision by a simple majority of four judges. But for the Supreme Court to declare the law unconstitutional on this appeal there must be a concurrence of at least six judges; even if the Supreme Court votes five-to-two to reverse the award of the Court of Appeals, the statute must be held constitutional and the decision of the lower court affirmed.[28] (c) Likewise, if the quo warranto proceeding *originates* in the Supreme Court, the Court may uphold the validity of a statute involved by a simple majority of the judges; yet to declare the act void would require a concurrence of at least six of the judges.

Hence, if a relator bases his claim upon a statute which is likely to be declared unconstitutional, he should by all means commence his quo warranto proceeding in the Supreme Court, since the statute will fall only if six judges agree to invalidate it. But if a relator seeks to have the statute declared void, he should start proceedings in a Court of Appeals, because the Supreme Court, by a simple majority of four judges, can affirm a decision of the Court of Appeals holding the statute to be unconstitutional.

The use of the device is not remote. On at least eighteen occasions the quo warranto writ has been used to test the validity of a statute.[29] Four such cases have arisen since the

[28] *Cf.* Barker v. City of Akron, 98 Ohio St. 446, 121 N.E. 646 (1918).

[29] State *ex rel.* Meacham v. Preston, 126 Ohio St. 1, 183 N.E. 777 (1932); State *ex rel.* Symons v. Rice, 96 Ohio St. 574, 117 N.E. 893 (1917); State *ex rel.* Pogue v. Groom, 91 Ohio St. 1, 109 N.E. 477 (1914); State *ex rel.* Ach v. Evans, 90 Ohio St. 243, 107 N.E. 537 (1914); State *ex rel.* Attorney-General v. Capital City Dairy Co., 62 Ohio St. 350, 57 N.E. 62 (1900); State *ex rel.* Attorney-General v. Brown, 60 Ohio St. 499, 54 N.E. 467 (1899); State *ex rel.* Wilmot v. Buckley, 60 Ohio St. 273, 54 N.E. 272 (1899); Mason v. State *ex rel.* McCoy, 58 Ohio St. 30, 50 N.E. 6 (1898); State *ex rel.* Richards v. Cincinnati, 52 Ohio St. 419, 40 N.E. 508 (1895); Street Railway Co. v. Street Railway Co., 50 Ohio St. 603, 36 N.E. 312 (1893); State *ex rel.* Wasson v. Taylor, 50 Ohio St. 120, 38 N.E. 24 (1893); State *ex rel.* Attorney-General v. Hudson, 44 Ohio St. 137, 5 N.E. 228 (1886); State *ex rel.* Attorney-General v. Hawkins, 44 Ohio St. 98 (1886); State *ex rel.* Attorney-General v. City of Cincinnati, 23 Ohio St. 445 (1872); State *ex rel.* Attorney-General v. Sherman, 22 Ohio St. 411 (1872); State *ex rel.* Attorney-General v. City of

adoption of Art. IV, Sec. 2 in 1912.[30] Those lawyers who do not believe that the power of the Supreme Court to declare laws invalid should be shackled might favor an indirect attack on the present restriction by working to abolish the original jurisdiction of the Supreme Court in quo warranto; this would eliminate one situation wherein the Supreme Court is now able to invalidate a statute only by an abnormal majority.

The above factors, it is believed, justify the abolition of the Supreme Court to hear quo warranto actions in the first instance. The original jurisdiction of the Supreme Court over quo warranto should be stricken from the Constitution. In the place of the Constitutional grant, the legislature should empower the Common Pleas to hear quo warranto, so that the Supreme Court would be limited to hearing appeals on issues of law. The procedure to be followed should be that of an ordinary civil action. This would reduce the cost of the court system, simplify the Constitution, and possibly further justice.

Original Writs with Appellate Functions

The remaining original jurisdiction of the Supreme Court in mandamus, procedendo, prohibition and habeas corpus (with the exception of a few phases of mandamus and habeas corpus) serves as steps in the appeal of litigation already commenced in inferior courts. These remedies grew in the common law as aids to the writs of appeal, error, and certiorari.

Certiorari and error were writs to appeal a case *after* the judgment had been rendered in the court below. It was often so difficult for a lawyer to decide when to use certiorari and when to use error that he might as well toss a coin. Yet the client might lose his cause of action if the attorney selected

Cincinnati, 20 Ohio St. 18 (1870); State *ex rel.* Attorney-General v. Kennon, 7 Ohio St. 546 (1857); State *ex rel.* Attorney-General v. Neibling, 6 Ohio St. 40 (1856).

[30] All four cases were original proceedings in the original jurisdiction of the Supreme Court. And in all four, the votes of the Supreme Court have been unanimous.

certiorari instead of error, or vice versa. Hence, upon the recommendation of the Ohio Judicial Council, the legislature has consolidated certiorari and error into the single appeal.[31]

On the other hand, mandamus, procedendo, prohibition and habeas corpus are historical writs for use in appealing litigation *before* judgment has been reached in the subordinate tribunal. Professor Sunderland points out the equal confusion, and costly results, attendant upon the choice of these writs:

> The volume of litigation which has involved the scope, purpose and proper limitations of these various appellate remedies has been appalling. I venture to say that the forms of action at common law never approached these forms of appeal in these burdensome consequences. Our appellate practice has become such a perpetual source of litigation in practically all our states, that Corpus Juris devotes more space to Appeal and Error than to any other subject in the law. The confusion which baffles the ingenuity of counsel could not be better demonstrated than by the admission of the appellate courts themselves that in case of doubt between two methods of appeal it would be prudent to use both . . . .[32]

The discussion that follows of the original jurisdiction of the Supreme Court in mandamus, procedendo, prohibition, and habeas corpus is intended to reveal the confusion surrounding these writs that today make them unworkable. The writer believes that the reform suggested by Professor Sunderland is still needed—that these writs be repealed from the Constitution and that there be substituted "a single form of appeal, consisting of a simple notice."[33] Ohio has adopted the reform in part by supplanting certiorari and error with the simple notice ("appeal"). Ohio should go the whole way.

---

[31] GENERAL CODE sec. 12223-46 abolished writs of error and certiorari in civil cases. Section 12223-1 defines the new single "appeal" as the means of reviewing civil cases.

[32] Sunderland, *Simplification of Appellate Procedure* (1929), 3 U. OF CIN. L. REV. 1, at p. 5.

[33] Sunderland, *op. cit. supra*, n. 32, at p. 6.

MANDAMUS

Since the lay-delegates at the Convention of 1851 had little idea of the meaning of *mandamus* in the common law, and since it nowhere appears from the *Proceedings* that the lawyer-delegates made any attempt to enlighten the laymen, the Supreme Court was free to decide for itself the scope of its power in mandamus. Two functions have been recognized. (1) The Court has received petitions for mandamus to commence litigation in the Supreme Court even though no steps were first taken in a lower tribunal. (2) And the Supreme Court has permitted mandamus in the appeal of cases pending in the lower tribunals.

To Initiate Litigation. The ancient prerogative of mandamus first took form as a letter to the king to seek his aid in ordering a royal officer to do his duty. As the monarch sidestepped his judicial tasks, the King's Bench assumed the duty of issuing the decrees. It was in the discretion of the judges whether or not to award mandamus, so that the practice has now arisen that the writ will issue only where the petitioner has no other adequate remedy.

The Ohio legislature had empowered the Supreme Court to grant mandamus in the very first Act to organize the judiciary in 1803.[34] The Court sought to apply the common law uses. And the legislature has enacted a definition of its own:

> Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoined as a duty resulting from an office, trust, or station.[35]

Thus, if an official or a layman who has been charged with some duty by common law or by statute refuses to execute his duty, an aggrieved party may go either to the Supreme Court, to a Court of Appeals, or to a Common Pleas to compel the

[34] Act of April 15, 1803, 1 Chase 356.
[35] OHIO GENERAL CODE, sec. 12283.

public agent to execute the function. If the petitioner satisfies the requirements of the writ, the Supreme Court cannot decline to hear the case on the ground that he could have obtained the same relief in mandamus in a lower court or because the controversy is too insignificant to require the attention of seven appellate judges—since the Constitution now commands:

> No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.[36]

There have been a few original mandamus actions before the judges of the Supreme Court that have warranted such distinguished trial masters. For example, in *State* ex rel. *American Union Telegraph Co.* v. *Bell Telephone Co.*,[37] the Court was petitioned to determine the right of the public to subscribe for the services of public utilities. In order to gag the competition of the rival American Union Telegraph Company, the Western Union contracted with the Columbus Telephone Company for telephone services and for the stipulation that the Telephone Company would not install any phones in the office of any rival company. The American Union petitioned the Supreme Court to compel the Telephone Company to install phone service; and the Court granted relief in mandamus because it found the statutory duty of a public telephone utility to be to furnish service to all subscribers willing to pay.

But most of the cases are far short of such social importance. Typical is the petition in *State* ex rel. *Walton* v. *Crabbe*,[38] in which an attorney retained by the department of welfare sought a writ from the Supreme Court to force the Attorney-General to issue a pay voucher. The legal problems were as insignificant as the compensation involved, and the Common Pleas or the Court of Appeals of Franklin County might have handled the case just as efficiently.

The continuance of the duty upon the Supreme Court to

---

[36] OHIO CONSTITUTION, Art. IV, sec. 2.
[37] 36 Ohio St. 296 (1880).
[38] 109 Ohio St. 623, 143 N.E. 189 (1924).

hear these original mandamus actions is at best an annoying luxury.[39] The petitioner has a selection of three courts in which to commence action, and his choice will usually be determined by which set of judges will probably hear his case most favorably. We are tolerating a trial court of seven judges, each of whom receives four times the amount of salary of a judge of the Common Pleas in many counties.[40] There is but one conclusion: the constitutional duty of the Supreme Court to hear original actions in mandamus should be abolished. The petitioner should be limited to the lower courts in commencing his litigation; the Supreme Court should hear only appeals on issues of law.

As an Appellate Writ. Mandamus is the writ designed to compel any public officer to do his duty. Therefore the writ should issue against any judge to order him to sit in trial of a case and proceed to judgment where he is instructed to do so by common law or statute. If a judge or presiding officer of a lower tribunal refuses to hear an action because he erroneously believes that he has no jurisdiction over the case, or if he refuses to proceed to judgment because he has erroneously accepted some reason to stop the suit, the aggrieved party can petition the Supreme Court to order the judge below to go ahead with the case. In hearing this petition the Supreme Court must decide whether the inferior court did have jurisdiction, or whether the reason assigned by the judge for refusing to proceed to judgment is invalid. And in making this decision the Supreme Court is reviewing a point of law decided by the inferior tribunal; thus it can be said that mandamus has the function of an appellate writ.

To illustrate. In *Matter of James Turner*,[41] an indictment

[39] Of more than 174 proceedings in mandamus heard by the Ohio Supreme Court, no fewer than 137 were commenced in its original jurisdiction.

[40] OHIO GENERAL CODE, sec. 2251: Chief Justice of the Supreme Court, $12,500; associate judge, $12,000; judge of Common Pleas, $3,000 to $12,000.

[41] 5 Ohio 542 (1832).

for murder was returned against Turner in the Common Pleas of Fairfield County. The judge observed that an indictment against the accused for the same offense had been presented to the Supreme Court (which acted as a trial court while on circuit before 1851). The judge asked Turner to elect in which court he desired to be tried. Turner stood mute. Thereupon the Common Pleas judge refused to proceed with the trial because the similar indictment was still pending before the Supreme Court. The prosecuting attorney then petitioned the Supreme Court to issue a writ of mandamus to order the judge of the Common Pleas to take jurisdiction. The writ did issue, for the Supreme Court found that mandamus applies "to compel courts to do that justice which the law enjoins them to administer,"[42] even though it will not constrain the judge "to act in a particular manner," nor to "prescribe what judgment to give."[43]

There are two strong limitations on the use of mandamus as an appellate writ. *First,* the writ will issue only where the inferior tribunal has not yet rendered a judgment. If a judgment has been given, no matter how obviously erroneous, mandamus will not issue to compel the lower court to change it, since the aggrieved party has adequate remedy to gain a reversal by ordinary error proceedings.[44] *Second,* although the Supreme Court may order the inferior tribunal to act, it will not compel it to act in any special way or to reach any particular conclusion. For example, where a probate judge is willing to proceed with a controversy to a final award, the Supreme Court will not intervene with mandamus to force him to construe a statute in any particular way;[45] the aggrieved party must wait until the probate judge renders judgment, and then attack that judgment by ordinary appeal.

[42] *Id.* at 543.

[43] *Id.* at 544.

[44] State *ex rel.* Schunk v. Hamilton, 127 Ohio St. 555, 190 N.E. 199 (1933).

[45] State *ex rel.* Stansberger v. Lamneck, 128 Ohio St. 35, 190 N.E. 142 (1934).

Shall the Supreme Court continue its power to use mandamus as an appellate writ? (1) Practice under the writ has become extremely confusing. In General Code sections 12283 to 12302 the legislature has sought to define the substance of the writ, as well as procedure. But since the power in mandamus has been created by the Constitution, the Supreme Court has said that as to the substantive scope of mandamus, "it is not in the power of the legislature either to add to or take from it";[46] and as to procedure, "the statute is not in any event conclusive upon this subject."[47] In future cases, will the Supreme Court follow the dictates of the Code, or will it deviate in favor of a common law rule?

Mandamus is said to be a discretionary writ[48] and will issue only when the Court is sure that the relator has no other adequate remedy.[49] But since the Constitution, Art. IV, Sec. 2, enjoins the Supreme Court from making any rule "whereby any person shall be prevented from invoking the original jurisdiction of the supreme court," can the Court exercise any discretion in granting or denying the writ when the relator establishes a right to relief?

The demarcation between the right to have mandamus and the necessity to recur to the ordinary error proceedings is not clear. Mandamus will issue only before the lower court has made a final decision; mandamus can never be used to specify how a subordinate tribunal shall act; a relator may not have the writ where any other adequate remedy is available to him. But there is doubt as to when a tribunal has made a final decision, or whether the relator has another adequate remedy. If a lower court has assumed jurisdiction, but is dilatory in proceeding although the relator is meanwhile put to serious

[46] State *ex rel.* Moyer v. Baldwin, 77 Ohio St. 532 at538, 83 N.E. 907, 19 L.R.A. (N.S.) 49, 12 Ann. Cas. 10 (1908).

[47] State *ex rel.* Cope v. Cooper, 121 Ohio St. 519 at 521, 169 N.E. 701, 8 Ohio L. Abs. 63 (1930).

[48] 25 OHIO JURISPRUDENCE, 975.

[49] State *ex rel.* Cope v. Cooper, 121 Ohio St. 519, 169 N.E. 701, 8 Ohio L. Abs. 63 (1930).

hardship, will the Supreme Court issue mandamus to order the lower court to hurry?[50] Of course, the relator will find out whether mandamus will issue when the Supreme Court renders its decree. But that's not administering law; it's gambling. Moreover, the relator may be held to have lost his right of appeal because he has chosen the wrong writ.[51]

(2) Mandamus may be subject to a tricky device in the testing of the validity of statutes. Such may be the result of the Constitutional limitation which restricts the power of the Supreme Court in declaring laws void to instances where six of the seven judges concur, except that a simple majority of four judges can affirm a decision of a Court of Appeals declaring a law unconstitutional.[52]

Suppose that a Common Pleas court refuses to proceed in determining a case solely because the judge believes the statute on which the plaintiff relies for his relief is invalid. By the Constitution[53] the aggrieved party has an opportunity to seek mandamus from either a Court of Appeals or the Supreme Court, to test the validity of the statute that the Common Pleas refuses to enforce. (a) If the relator petitions a Court of Appeals, and if this Court should hold the law unconstitutional, then the Supreme Court could affirm the decision of the Court of Appeals by a simple majority of four judges. (b) On the other hand, if the relator petitions the Supreme Court in the first instance, it would take a concurrence of six judges to hold the statute invalid and thereby refuse a writ of mandamus. Obviously, if the relator depends on the validity of a statute to gain relief, the sensible thing for him to do is to seek mandamus immediately from the Supreme Court.

---

[50] *Cf.* the relator's predicament in *State* ex rel. *Schunk v. Hamilton*, 127 Ohio St. 555, 190 N.E. 199 (1933), where the Court of Appeals had assumed jurisdiction of an appeal but was postponing final judgment.

[51] For example, consider the petitioner's plight in *Shelby v. Hoffman*, 7 Ohio St. 450 (1857).

[52] OHIO CONSTITUTION, Art. IV, sec. 2. For a more complete discussion, see Hausser, *Limiting the Voting Power of the Supreme Court: Procedure in the States* (1938) 5 OHIO ST. L.J. 54.

[53] Art. IV, secs. 2, 6.

Such tactics have been used in Ohio. In *State* ex rel. *Williams* v. *Industrial Commission of Ohio*,[54] the relator, an injured employee, invoked the original jurisdiction of the Supreme Court in mandamus to compel the Industrial Commission to compensate the relator from its surplus fund because the employer was insolvent. General Code sec. 1465-75[55] orders such payments from a fund (raised from premiums paid by solvent employers) when the employer of the injured party is insolvent. Because *three* judges could find no constitutional objection to the act, a writ had to be granted, even though *four* members of the Court believed that the statute violates the due process clause of the Fourteenth Amendment.

Counsel for the relator were wise in commencing the action in the Supreme Court. For, if the case had originated in a Court of Appeals unsympathetic to the statute, then, on appeal to the high tribunal, the four dissenting judges above could have controlled the decision and hence denied relief.[56]

The attendant evils of mandamus, as described above, justify the total abolition of the power of the Supreme Court to issue mandamus. Instead, the Constitution should be amended so as to empower the Assembly to regulate procedure on appeal. Then the legislature should rephrase the uniform statutory appeal (now in General Code secs. 12223-1 *et. seq.*) to include an appeal to order an inferior tribunal to proceed before it has rendered a judgment. No longer would a litigant run the risk of losing all right of appeal because he chose *mandamus* instead of *appeal*. The Supreme Court could discuss the substantive rights instead of wrangling with the procedural intricacies of a prerogative writ. The appellant's lawyer would not then have a choice of appellate courts through which to obtain a more favorable decision on the constitutionality of a statute.

[54] 116 Ohio St. 45, 156 N.E. 101 (1927).

[55] As amended March 26, 1925.

[56] This same strategy proved successful in *State* ex rel. *Durbin v. Smith*, 102 Ohio St. 591, 133 N.E. 457 (1921), and in *State* ex rel. *Jones v. Zangerle*, 117 Ohio St. 507, 159 N.E. 564 (1927).

PROCEDENDO

Procedendo is another common law writ that the Convention of 1851 fossilized into the present Constitution. The Supreme Court had used this writ years before 1851[57] without the aid of any express constitutional authority. And when the Judiciary Committee of the Convention of 1851 proposed that the Supreme Court be expressly empowered to issue writs of procedendo, the lay delegates were too browbeaten by the Latin terminology to question the necessity for its inclusion. Procedendo has continued to browbeat lawyers too.

Pollock and Maitland,[58] and Holdsworth,[59] in their standard treatises on the English law, did not consider this writ of sufficient importance to describe its operation.

Technically, procedendo is a writ issued in an action that has previously been removed from an inferior court to a superior court by habeas corpus, certiorari, or writ of privilege, and where

> It does not appear to such superior court that the suggestion upon which the cause has been removed is sufficiently proved; in which case the superior court by this writ remits the cause to the court from whence it came, commanding the inferior court to proceed to the final hearing and determination of the same.[60]

In simpler terms, when an inferior court has without justification refused to take jurisdiction of a case, or to prosecute a case to judgment, the aggrieved party may apply to the Supreme Court to issue the writ of procedendo to direct the inferior court to take charge of the action and proceed to judgment. But if the lower court has already rendered judgment, the petition for a writ of procedendo cannot be used to bring the case to the attention of the Supreme Court—because such a heresy would invade the scope of the appellate writs of certiorari, error and appeal.

---

[57] *Cf.* In the Matter of Samuel Kazer, 5 Ohio 544 (1832).

[58] POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed., 1901).

[59] HOLDSWORTH, A HISTORY OF ENGLISH LAW (1927).

[60] 2 BOUVIER'S LAW DICTIONARY (Rawle's 3d rev.), p. 2729.

Procedendo, then, is not an original writ in the sense of giving a plaintiff the right to initiate his litigation in the Supreme Court. Rather, the litigants first must have attempted to gain relief from an inferior court. Only when the lower court has refused to render a judgment will the Supreme Court use its "original jurisdiction" in procedendo.[61]

The untutored law clerk will now ask: "In these cases, the Supreme Court orders the lower court to take some affirmative step. Why does not mandamus fill the need just as well? How will I know when to use procedendo and not mandamus?"

The Supreme Court sought to supply a distinction between procedendo and mandamus in *Matter of Samuel Kazer*.[62] Samuel Kazer had been tried and convicted of arson in the Court of Common Pleas of Delaware County. Upon a writ of error, the Supreme Court reversed the conviction and ordered a new trial. But since the journal entry of the Supreme Court ordered only the keeper of the penitentiary to return the prisoner to the sheriff—and did not specifically order the Court of Common Pleas to retry the case—the trial judge refused to proceed because he did not believe that he had jurisdiction. The Supreme Court then issued procedendo to compel the trial judge to act. According to the Supreme Court, mandamus might be issued to the Common Pleas judge; "but as a peremptory *mandamus* is not ordered in these cases in the first instance, we believe the ends of justice will be attended with equal certainty and more speed by *procedendo*."[63]

But the Supreme Court did not explain *why* procedendo compels greater speed and certainty than mandamus.

The Supreme Court did finally admit that mandamus is equally as efficient, in *State* ex rel. *Smith* v. *Smith*.[64] Here the relator, a state milk inspector, petitioned the Supreme Court to exercise its original jurisdiction in mandamus to compel the

[61] *Cf.* Matter of Samuel Kazer, 5 Ohio 544 (1832).
[62] *Ibid.*
[63] *Id.* at 545.
[64] 69 Ohio St. 196, 68 N.E. 1044 (1903).

defendant, a justice of the peace, to proceed with a misdemeanor prosecution against one Townsley, without the intervention of a jury. The magistrate had doubted his jurisdiction to proceed with the case except by the use of a jury. The Supreme Court thought otherwise, and issued mandamus to order the justice of the peace to hear the prosecution. Shauck, J. explained that mandamus could be used instead of procedendo:

> Formerly the writ of *procedendo ad judicium* was awarded by a court of superior jurisdiction to compel an inferior tribunal to proceed in cases where it refused to act because doubtful of its jurisdiction, or satisfied that it had none. It was, in substance, a writ of mandamus though having a peculiar name because of its office in the particular case. But in modern practice the distinction in name has disappeared and mandamus is allowed, not to control discretion, but to compel its exercise.[65]

In other words, procedendo may be dropped from the Constitution because its function is adequately served by the more inclusive writ of mandamus. And the writer has already recommended the elimination of mandamus in favor of a more extended operation of the statutory appeal.[66]

Indeed, so long as procedendo continues in the Constitution, it is a pitfall into which the litigant may lose his substantive rights, solely because he has erroneously chosen this method of appeal instead of another. This danger lurked in *State* ex rel. *Barnes* v. *Marsh*.[67] The relatrix had petitioned the Supreme Court in its original jurisdiction to issue mandamus or procedendo to compel judges in the courts below to expunge certain judgments rendered against the relatrix. The Supreme Court refused this relief, since when a case has reached the judgment-stage, the proper method to attack a judgment (that is regular on its face) is by error proceedings, not mandamus or procedendo:

---

[65] 69 Ohio St. 196, at p. 201.

[66] In the past few years, the only petition for a writ of procedendo from the Supreme Court in its original jurisdiction has been *State* ex rel. *Davey v. Owen*, 133 Ohio St. 96, 10 Ohio Op. 102 (1937).

[67] 120 Ohio St. 222, 165 N.E. 843 (1929).

Plaintiff has a misconception of the province of a suit in mandamus as well as of the province of a suit in *procedendo*. Such suits cannot be made the instrumentality of review.[68]

Prohibition

Prohibition is another common law writ that enables the litigant to appeal his case to the Ohio Supreme Court *before* the subordinate tribunal has rendered judgment. It is probable that the Supreme Court made no use at all of this writ before 1913. No Constitutional Convention before that of 1912 discussed the need for it. But in 1912 the influential delegate Judge Worthington proposed to include the writ of prohibition as one of the original jurisdictions of the Supreme Court. The following is the discussion of the writ of prohibition in the Convention of 1912, which caused the writ to be inserted into the present Constitution:

Mr. Worthington: . . . There will be some lawyers here who have not looked at their Blackstone for some years, and who may have very hazy notions in their own minds as to what a writ of prohibition is. It is a writ that is used by the higher court in ordinary parlance to keep an inferior court within the limits of the jurisdiction that the law prescribes for it. It is a short cut to tell the inferior court to mind its own business and not attempt to do something that the law does not authorize it to do. It was a writ that was exercised by the court of King's Bench in England, and that was brought over to all the courts of last resort in this country. I believe it was possible to have been exercised by the supreme court under the constitution of 1802 in Ohio, but was made impossible in the constitution of 1851. Why the change was made I do not know.

[Worthington referred to a case (He did not remember the citation.) wherein a trial judge was probably exceeding his powers. To stop him, and since there was no writ of prohibition in the Ohio Supreme Court or the Circuit Courts] . . . the lawyers tortured . . . the writ of mandamus with the writ of injunction into a writ of prohibition,

[68] 120 Ohio St. 222, at p. 224. The Supreme Court generously allowed the relatrix thirty days in which to amend her petition. But the amended petition failed to bring relief, in *State* ex rel. *Barnes v. Marsh*, 121 Ohio St. 321, 168 N.E. 473 (1929), and *State* ex rel. *Barnes v. Marsh*, 121 Ohio St. 477 (1929).

and we had that sort of thing going on in the courts of Hamilton County which accomplished exactly the same result of what they thought was a mandamus to compel the judge not to do what he was going to do, and they coupled that with a prayer for injunction. To a lawyer who was brought up in the old school such a thing would have caused I don't know how much mental trouble. I was not brought up under the old school, but I was near enough to it to remember how those who were the leaders when I was young at the bar would have looked at a matter of that kind. I cannot conceive any possible harm that the granting of the power to issue that writ to the supreme court would give and I can see that it might prevent a great deal of trouble.[69]

Prohibition at Common Law. Prohibition is a prerogative writ issued by a superior court and directed to an inferior tribunal, or to an "inferior ministerial tribunal possessing incidental judicial powers and known as a quasi judicial tribunal; or even in extreme cases, to a purely ministerial body, commanding it to cease abusing or usurping judicial functions." It attempts to stop an inferior court or tribunal "from usurping jurisdiction with which it is not legally invested."[70]

First used by the Crown as a weapon to limit the jurisdiction of the Ecclesiastical Courts,[71] the writ of prohibition is now used by a lay superior court against a secular inferior court. It does not settle a case on its merits, but merely stops a lower court from doing so. It is similar to injunction in that both stop proceedings; but injunction is directed against the litigants, whereas prohibition is a command against the court itself.

Defects of the writ in Ohio. (1) Although the Ohio courts commenced their use of prohibition only in 1913, a penumbra of judicial fog already beclouds the practice under the remedy. It has taken costly litigation to instruct Ohio lawyers that prohibition will not issue where the relator could have pursued an adequate remedy at law.[72] And that prohibition is not a substi-

[69] 1 *Proceedings and Debates, Convention of 1912* (1912), p. 1044.

[70] 32 OHIO JURISPRUDENCE, "Prohibition," sec. 2.

[71] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed., 1901), p. 665.

[72] State *ex rel.* Wade v. Kinkead, 113 Ohio St. 487, 149 N.E. 697 (1925).

tute for writ of error; therefore prohibition will not lie if the lower court has rendered a judgment.[73] And that prohibition issues to restrain a court from exercising powers of jurisdiction which it does not have, but will not issue where a court, having competent jurisdiction, is about to issue an erroneous judgment.[74] And that prohibition issues as of right, not by discretion of the Court.[75] Additional academic refinements have been the by-product of forty-four other proceedings commenced in the Supreme Court alone.

(2) The right of a litigant to invoke the original jurisdiction in prohibition produces an undesirable method of testing the constitutionality of a statute, similar to that discussed above in the consideration of mandamus. This strategy has not as yet been employed, but it might well be attempted in testing such statutes as delegate unconstitutional powers to the courts of common pleas, probate courts, justices of the peace, municipal courts, or administrative tribunals exercising judicial powers.

The confusion in administering the writ of prohibition, together with its possible abuse in the testing of the validity of a statute, warrants the repeal of the writ from the Constitution. In its place, the legislature should extend the existing unitary statutory appeal[76] to include a fourth category in addition to the third category advocated in the previous discussion of mandamus: (d) appeal before judgment to prohibit further proceedings in the inferior tribunal. The legislature could then make further changes as the needs arise, without the necessity for constitutional amendments. And the Supreme Court could not dismiss the appeal because the appellant had chosen the wrong writ. These reforms suggested under the discussions of *Mandamus* and *Prohibition* would enlarge the power of the

[73] *Ibid.*

[74] State *ex rel.* Firestone Tire & Rubber Co. v. Duffy *et al.*, Industrial Commission of Ohio, 114 Ohio St. 702, 152 N.E. 656 (1926).

[75] State *ex rel.* Garrison v. Brough, 94 Ohio St. 115, 113 N.E. 683 (1916).

[76] OHIO GENERAL CODE, sec. 12223-1, which now has two categories: (a) appeal on questions of law, (b) appeal on questions of law and fact.

appellate courts to hear appeals in many cases before a final order has been granted. It would still not permit appeals from any intermediate order, as is allowed today in New York.

Habeas Corpus

Habeas corpus—a prerogative writ so hallowed by the layman that legislators would reflect twice before proposing any substitute. And being an historical writ, habeas corpus is now so shrouded in judicial fog that the lawyer shies away. As a result, the layman and the lawyer are on a par: both revere the writ because of its mystery. Nevertheless, it is high time someone peeks up to discover whether we are not worshipping an idol.

As an original writ. In general, habeas corpus is a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. It seeks to protect one's personal liberty from unlawful restraint.

In Ohio habeas corpus has two procedural functions. (1) It may be the object of an ordinary civil action to free a person restrained by a defendant who has not claimed to have the right to do so by reason of any judicial proceeding. Thus, a person claiming the right to custody of children may have habeas corpus against one who is allegedly holding the minors unlawfully.[77] The writ will issue in favor of a parent to secure the release of a minor son from state military service where the son has misrepresented his age and has enlisted without his parent's consent.[78] And when a sane person is confined in an insane asylum, the court must grant habeas corpus.[79]

The Supreme Court has been expressly empowered with this original jurisdiction in habeas corpus since 1851. Indeed,

[77] Clark v. Bayer, 32 Ohio St. 299 (1877).
[78] *Re* Kutchta, 81 Ohio St. 508, 91 N.E. 1132 (1909).
[79] *Re* Gunning, 14 Ohio C.C. 507, 7 Ohio C.D. 443 (1897).

the Constitutional amendment of 1913 forbade the Supreme Court to pawn off this jurisdiction—by stipulating that:

> no law shall be passed nor rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.[80]

In 1851 it was not unreasonable to give the judges of the Supreme Court this original power, because at that time they were "stirrup justices" and heard all important trials in the first instance. Moreover, since the number of judges in Ohio was small, it was important that every one of them have power to issue that great protective remedy.

Disadvantages of the Original Power in the Supreme Court. But today the Supreme Court sits only at Columbus, where a Court of Appeals, a Court of Common Pleas, and a Probate Court all meet and can issue the writ with the same effectiveness as the Supreme Court. There are now enough local judges in Ohio to make the writ easily available everywhere. A proceeding in habeas corpus may involve laborious factual controversies. Hence, it may be that today the hearing of habeas corpus actions as a writ to initiate a litigation should be confined to inferior tribunals. On the other hand, the writ may still be so valuable a remedy that every judge except the police judges should continue to have power to issue it. The Ohio Judicial Council should study whether the Supreme Court should discard its power to hear habeas corpus in the first instance, and whether the voters would consent to such a repeal.

It is this writer's opinion that original jurisdiction in the Supreme Court over habeas corpus should be abolished. If "habeas corpus" sounds too good to eliminate from the Constitution, the next Convention might retain it only in the Bill of Rights, where it should be stipulated that habeas corpus be preserved as a civil right. The legislature could then vest it in those courts as found necessary.

As an Appellate Writ. (2) In Ohio, habeas corpus is used also as a means of appeal of litigation to the Supreme Court.

[80] Now in Art IV, sec. 5.

The writ seeks to protect a person from unlawful restraint by anyone; therefore, it will issue against any public officer who holds a person pursuant to a void court process or judgment. The habeas corpus proceeding is thus resolved into an appellate or collateral attack on a proceeding of an inferior tribunal. The question is whether the order which resulted in confinement of the prisoner is void.

(a) Here the fog thickens, and justifies Professor Sunderland's contention that the appellate function of habeas corpus be abolished. When habeas corpus issues, the prisoner walks away a temporarily free man; under ordinary proceedings in error, the prisoner may be detained to await a new trial. Hence, to make the most sparing use of habeas corpus, the Supreme Court has said that the writ will issue only where the proceedings below were clearly "void"; but if the void character of the order does not clearly appear on its face, or if the proceeding was only "irregular," then the prisoner must resort to appeal.[81]

(b) As might be expected, the Ohio courts have faltered in attempting to apply the distinction between "void" and "irregular" proceedings. In *Ex Parte Shaw*,[82] the Supreme Court announced "jurisdiction" as the test of a void proceeding; the writ would issue only if the court below did not have "jurisdiction" of the subject matter or the parties. Thus, habeas corpus may not be used to revise errors or irregularities in the sentence of a court of competent jurisdiction.[83] Nevertheless, in *Lewis* v. *Reed*[84] the Supreme Court ruled that a petitioner may invoke habeas corpus to attack a judgment *for fraud in its procurement*, even though the judgment may appear on its face regular and made by a court of competent jurisdiction.

The Supreme Court, in its desire to limit the scope of

[81] Yutze v. Copelan, 109 Ohio St. 171, 142 N.E. 33, 32 A.L.R. 1048 (1923).

[82] 7 Ohio St. 81 (1857).

[83] Ex Parte Bushnell, 9 Ohio St. 77 (1859).

[84] 117 Ohio St. 152 (1927).

habeas corpus, might reasonably have allowed this remedy only where the lower court has not yet reached judgment. If the trial court has once reached a final decision, the defendant might be relegated to the normal appeal. This is the distinction the Supreme Court has drawn in applying prohibition. But not so with habeas corpus. Of course the writ will issue to free a suspect who has been confined to await action by the grand jury and where the grand jury has adjourned without returning an indictment.[85] But as we have seen above, the Court allows habeas corpus to strike down a "judgment" fraudulently procured even though the defendant might have prosecuted a direct appeal.

(c) The Supreme Court does make a temporal distinction —Is habeas corpus being sought *before* or *after* conviction by the trial court?—in deciding whether habeas corpus may be used to test the constitutionality of a statute. If the defendant has been restrained, *but not yet convicted*, under the statute alleged to be unconstitutional, he can bring habeas corpus, and have the question of constitutionality of the statute decided by the judge hearing the petition for the writ.[86] On the other hand, if the trial court has once ordered conviction upon the basis of the statute, the defendant may not have habeas corpus, but must test the validity of the law by an ordinary appeal.[87] This distinction appears irrational. A man's liberty is no less important to him after conviction than before a conviction. Both before and after judgment, the trial court is a court of competent jurisdiction to rule on the constitutionality of a statute, without the need for an overlapping jurisdiction of an appellate court in habeas corpus.

(d) Again, as a result of the restricted power of the Supreme Court in Art. IV, Sec. 2 in voting on the constitutionality

[85] State *ex rel.* Parks v. Lott, 5 Ohio N.P. 469, 5 Ohio D.N.P. 600 (1894).

[86] Arnold v. Yanders, 56 Ohio St. 417, 47 N.E. 50, 60 Am. St. Rep. 753 (1897); *Re* Preston, 63 Ohio St. 428, 59 N.E. 101, 81 Am. St. Rep. 642, 52 L.R.A. 523 (1900).

[87] Yutze v. Copelan, 109 Ohio St. 171, 142 N.E. 33, 32 A.L.R. 1048 (1923); Ex Parte Elicker, 117 Ohio St. 500, 159 N.E. 478 (1927).

of statutes, a resort to the original jurisdiction of the Supreme Court in habeas corpus may produce inconsistent holdings as to the validity of legislative acts. If this inconsistency is considered a defect in the Ohio constitutional system, it must be borne as part of the price we pay for preserving habeas corpus as an appellate writ.

(e) To allow the concurrent jurisdiction of the various courts in habeas corpus enables the petitioner a choice of judges before whom to commence his suit. Naturally, he will use this advantage for self-serving ends: to seek a set of judges who will be more sympathetic to his cause.

From a consideration of the above factors the writer believes that the time has come for legal reformers to question whether the Supreme Court should continue to have jurisdiction in habeas corpus, in its original and in its appellate aspects. (1) Since 1850 the number of courts (with power to issue the hallowed writ) has so increased in Ohio that it no longer seems necessary to order the Supreme Court judges to be available to hear petitions in habeas corpus. (2) When used as an appellate writ in pending litigation, habeas corpus merely adds to the overlapping and confusion which Professor Sunderland has struck against. In its place, the uniform statutory appeal, in its existing scope and in the extensions that I have advocated under the previous discussion of mandamus and prohibition, would perform the same functions, and more effectively. To guarantee a speedy hearing where a man is imprisoned, the Supreme Court could give calendar preference to these cases.

Summary

Should the above discussion be convincing, we may well propose the following constitutional and statutory reforms:

(1) From Art. IV, Sec. 2 there should be repealed the original jurisdiction of the Supreme Court in quo warranto, mandamus, procedendo, and prohibition. (At the same time the original jurisdiction of the Courts of Appeals in quo war-

ranto, mandamus, procedendo, and prohibition should likewise be erased.)[88] And the Ohio Judicial Council might consider whether the original jurisdiction of the Supreme Court and the Courts of Appeals in habeas corpus is desirable.

As protection against a reactionary court decision, the Constitution should be amended specifically to empower the General Assembly to regulate procedure on appeal.

(2) The legislature should direct the Courts of Common Pleas to hear actions in quo warranto.[89]

(3) The General Assembly can rephrase the uniform statutory appeal[90] to include two new items: (c) appeal to order an inferior tribunal to proceed, and (d) appeal to prohibit an inferior tribunal from taking further action. And the legislature can provide that the relator shall not be ousted merely because he has chosen the wrong writ.

[88] OHIO CONSTITUTION, Art. IV, sec. 6: "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procendo . . . ."

[89] The legislature has the power to do this under Art. IV, sec. 4 of the Constitution.

[90] OHIO GENERAL CODE, sec. 12223-1 *et seq.*